

STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

1
2
3 [REDACTED], a Student, by and through
4 Parent [REDACTED],

No. 07C-DP-07042-ADE

5 Petitioners,

6 -v-

7 Cottonwood-Oak Creek School District
8 No. 6,

9 Respondent.
10

ADMINISTRATIVE
LAW JUDGE
DECISION

11
12 **HEARING:** May 22-23, 2007

13 **APPEARANCES:** Parent [REDACTED] appeared on behalf of herself and her child
14 Student N. H.; Attorney Kellie Dolan, MANGUM, WALL, STOOPS & WARDEN,
15 P.L.L.C., appeared on behalf of the Cottonwood-Oak Creek School District No. 6.
16 Court Reporters Cindy Denholm (May 22) and Wilma Weinreich (May 23) of Griffin &
Associates recorded the proceedings.¹

17 **WITNESSES:** For Petitioners: **Sue Marsh**, Executive Director, Four
18 County Conference on Developmental Disabilities (hereinafter "Developmental
19 Disabilities Worker");² **Charles Atwell**, First Grade Teacher at Verde Valley Christian
20 School ("First Grade Private School Teacher"); [REDACTED], Friend of Parent
("Friend"); [REDACTED], Student's Grandfather ("Grandfather"); and **Parent**.

21 For Respondent School District: **Michael P. Viotti, Ed.D.**,
22 Respondent School District Psychologist; **Karen Hughes**, Respondent School District
23 Speech Language Pathologist (hereinafter "Speech Language Pathologist"); **Debra**
24 **Sims**, First Grade Teacher at Dr. Daniel Bright Elementary School in Respondent
25 School District ("First Grade Public School Teacher"); **Marilyn Bliss**, Second Grade
26 Teacher at Dr. Daniel Bright Elementary School in Respondent School District ("Former
27 Second Grade Public School Teacher"); **Kristen Mezulis**, First and Second Grade
28 Teacher at Dr. Daniel Bright Elementary School in Respondent School District ("Current
Second Grade Public School Teacher"); **Sharon Block**, Respondent School District
Social Worker ("School Social Worker"); **Kathy Epperson**, Principal at Dr. Daniel Bright
Elementary School in Respondent School District ("Elementary School Principal"); and

29
30 ¹ The parties agreed during the pre-hearing conference that the court reporter's record would be the
official record of the hearing, even though this tribunal has also made a digital recording of the
proceedings for purposes of reviewing testimony.

² To avoid the use of proper names, and in order to help protect confidentiality, each witness, except for
Dr. Viotti, is designated a generally descriptive name to be hereinafter used in the body of the Decision.

1 **Patricia Osborne**, Director of Special Services at Respondent School District ("Special
2 Ed. Director").

3 **ADMINISTRATIVE LAW JUDGE:** Eric A. Bryant

4
5 Parent K. A. brings this due process action, on behalf of herself and her [REDACTED]
6 Student [REDACTED], to challenge the determination made by Respondent Cottonwood-Oak
7 Creek School District that found Student not eligible for special education services. The
8 law governing these proceedings is the Individuals with Disabilities Education Act
9 ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended
10 in 2004),³ and its implementing regulations, 34 Code of Federal Regulations (C.F.R.)
11 Part 300,⁴ as well as the Arizona Special Education statutes, Arizona Revised Statutes
12 (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative
13 Code (A.A.C.) R7-2-401 through R7-2-406.⁵

14 A pre-hearing conference was held on May 10, 2007, and the parties agreed that
15 the issues to be decided were as follows:

- 16 1) Whether Student is eligible for special education under
17 the IDEA and Arizona law?
- 18 2) If Student is eligible, what instruction and services are
19 required for Student's Individualized Educational
20 Program (IEP)?
- 21 3) If Student is eligible for special education, is [REDACTED] eligible
22 for Extended School Year (ESY) services for Summer
23 2007?

24 ³ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"
IDEA 2004 became effective on July 1, 2005.

25 ⁴ The current regulations became effective October 13, 2006, about three months *after* Respondent
26 School District's decision to deny eligibility. This means that the pre-October 2006 regulations are the
27 applicable regulations and would usually be applied and cited to herein. However, a comparison of the
former and current applicable regulations shows that they are substantially the same, the differences
being only re-numbering and minor grammatical changes. Therefore, because it makes no difference,
this Decision will apply and cite the current regulations.

28 Additionally, the promulgation of new regulations effective October 2006 also raised the interesting
29 possibility that Student would be ineligible under the old regulations but eligible under the new regulations,
or vice versa. But, as already mentioned, the applicable regulations are substantially the same and so the
possibility is removed because eligibility criteria for Student did not change with the new regulations.

30 ⁵ It is noted that these rules are being revised to comport with the 2005 changes in federal and Arizona
special education law, but have not yet been published.

1 Parent was informed that these issues are progressive: If the first issue is answered in
2 the negative, the other issues will not be addressed.

3 The parties presented testimony and Exhibits at the hearing on May 22 and 23,
4 2007. Petitioners presented testimony from the witnesses noted above and Exhibits
5 numbered 1 through 28, which were admitted into the record.⁶ Respondent School
6 District presented testimony, from the witnesses noted above, and Exhibits numbered 1
7 through 43.⁷ The Administrative Law Judge has considered the entire record, including
8 the testimony and exhibits,⁸ and now makes the following Findings of Fact, Decision,
9 and Order finding that Student is not eligible for special education services because he
10 is not a child with a disability as defined by the IDEA and Arizona law.

11 FINDINGS OF FACT

12 1. In November 2005, Student moved from another state with his family into the
13 geographical boundaries of Respondent School District. Student was a [REDACTED]-year-old
14 [REDACTED]-grader at the time and had an individualized educational program (IEP) from the
15 non-Arizona school district where [REDACTED] had been receiving instruction and services as a
16 child with a disability. Parent immediately enrolled him in the Respondent School
17 District, who prepared and began implementing an IEP that was equivalent to the non-
18 Arizona IEP, and who began providing services equivalent to the services Student had
19 been getting in the other state. Respondent School District also immediately began
20 gathering information for use in evaluating Student for special education services.

21 2. From the age of two, Student had been identified as developmentally
22 delayed.⁹ [REDACTED] displayed delays in language and social skills.¹⁰ [REDACTED] also displayed
23 peculiar mannerisms such as pressing [REDACTED] fist against his cheek at times, repetitively
24 shaking a string, and passing [REDACTED] fingers ("flicking") or paper or other objects in front of
25 [REDACTED] eyes.¹¹ [REDACTED] was diagnosed at least as early as 2003 with Asperger's Syndrome,¹² a
26 condition on the upper end of the autism disorder spectrum. Because [REDACTED] was a high-

27 ⁶ These Exhibits are listed and briefly described in Petitioners' Exhibits and Witness List filed May 17,
28 2007. Petitioners' Exhibit 23 was not offered into evidence and, therefore, was not admitted.

⁷ A List of Witnesses and Exhibits appears at the front of Respondent School District's Exhibit Notebook.

⁸ The Administrative Law Judge has read each Exhibit, even if not mentioned in this Decision.

⁹ Respondent's Exhibit 3.

¹⁰ Respondent's Exhibit 4 (same as Petitioners' Exhibit 4).

¹¹ *Id.*

1 functioning autistic student, ■ was able to keep on the same academic level as ■
2 peers in a general educational setting.¹³ ■ did not need special help with academics;
3 goals were written for communication and social skills.¹⁴

4 3. Upon Student's arrival in Arizona, Respondent School District performed a
5 comprehensive evaluation of ■ functioning and academic needs.¹⁵ The evaluation
6 was performed in December 2005 by Michael P. Viotti, Ed.D. Dr. Viotti is a licensed
7 clinical psychologist in Arizona, since 1984, as well as a certified school psychologist.¹⁶
8 He has both a private clinical practice and acts as the Respondent School District's
9 Supervisor of Psychological Services, which requires him to perform comprehensive
10 psycho-educational evaluations like the one he performed in this case. In his testimony
11 at hearing, he explained that a clinical evaluation, done for clinical purposes, is different
12 from an educational evaluation. A clinical evaluation will use a medical model and the
13 Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) to
14 assess the person. An educational evaluation will use an educational model and focus
15 on the person's educational functioning and needs because of a disability. For
16 Student's evaluation, he used an educational model as required under the IDEA.

17 4. As part of Student's evaluation, Dr. Viotti gathered information through
18 Parent, teachers, other professionals, service providers, prior medical and education
19 records, and testing and assessments performed by Dr. Viotti or other school
20 professionals and Parent.¹⁷ This included review of medical and developmental history,
21 review of school records, classroom observations, parental input, and interviews.¹⁸
22 Testing consisted of intelligence testing, achievement testing, a visual motor test, and
23 assessments for behavior, adaptive behavior, and Asperger's Syndrome.¹⁹ Dr. Viotti
24 reviewed Student's background (medical history, developmental history, parent
25 information), prior evaluations, and educational history²⁰. He noted that none of the

26 ¹² *Id.*

27 ¹³ *Id.*

28 ¹⁴ Respondent's Exhibit 6.

29 ¹⁵ Respondent's Exhibit 25.

30 ¹⁶ Respondent's Exhibit 28.

¹⁷ Respondent's Exhibit 25 at 1-2.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 2-3.

1 previous evaluations were comprehensive psycho-educational evaluations and that his
2 was the first for Student.²¹ He noted the prior diagnoses and disability categories that
3 Student was given before coming to Arizona—Developmental Delay, Autism Spectrum
4 Disorder, and Asperger's Syndrome.²² He also noted that Student was receiving
5 special education services in the prior state as a pre-schooler with Developmental
6 Delay/Autism and was had done well academically.²³ Indeed, Student spent some time
7 in a "Spanish Immersion" classroom in which activities were conducted in Spanish,
8 which is not Student's native language, and Student apparently stayed at the same
9 level as [REDACTED] peers.²⁴

10 5. The December 2005 evaluation gathered classroom observations from a
11 variety of sources including First Grade Public School Teacher, Speech Language
12 Pathologist, a special education coordinator, a school psychologist, and Dr. Viotti, all of
13 whom had observed Student during the several weeks that he had been attending
14 school in Respondent School District.²⁵ These observations showed that Student
15 played well with others and joined games when asked. [REDACTED] sat with others at lunch and
16 conversed with them. [REDACTED] played on the playground with others. [REDACTED] had normal eye
17 contact and speech, and behaved well in the classroom.

18 6. The observers did note several unusual behaviors. Student at times directed
19 conversations to [REDACTED] topic of interest and stayed on that topic unless re-directed.²⁶ [REDACTED]
20 could be "easily" re-directed, however.²⁷ Also, self-stimulating behaviors were observed
21 such as rubbing [REDACTED] hand on the wall as [REDACTED] walked down a hall and occasionally holding
22 [REDACTED] fingers up in front of [REDACTED] eyes to watch their movement.²⁸ Dr. Viotti summarized the
23 observational information as follows:

24 Overall, observations indicate that [Student] is participating
25 in [REDACTED] class activities, is accepted by others, initiates
26 conversations, joins in play and seeks out friendships. [REDACTED]
27 eye contact is good and [REDACTED] is able to carry on an appropriate

28 ²¹ *Id.* at 1.

29 ²² *Id.* at 4.

30 ²³ *Id.* at 4-5.

²⁴ Respondent's Exhibit 4.

²⁵ Respondent's Exhibit 25 at 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 6.

1 conversation at least 85% of the time. [REDACTED] is easily re-
2 directed and does not have difficulty changing topics when
3 asked to do so. There were some unusual motor
4 mannerisms noted. [Student] appears to be aware of [REDACTED]
need for stimulation, and for the most part it is not noticed by
others.²⁹

5 7. Student's intellectual testing showed average ability with no significant
6 weaknesses.³⁰ [REDACTED] academic achievement testing showed academic strength.³¹

7 8. The results of Student's behavioral assessments and Asperger's inventory
8 were inconsistent. Student's teachers assessed [REDACTED] in the average range, while Parent
9 rated [REDACTED] in the low and at-risk ranges.³² Dr. Viotti testified that he took all of this
10 information into account as valid information, but he did not explain the significance of
11 the inconsistencies and how they affected his conclusions.

12 9. Taking all of the information into account, Dr. Viotti concluded that Student
13 did not need special education and related services.³³ He testified that Student was
14 doing well at school in a regular classroom with minimal accommodations. Student's
15 disability did not seem to adversely affect [REDACTED] education.

16 10. Student was evaluated in February 2006 by an occupational therapist, who
17 wrote a report concluding that Student did not need occupational therapy services.³⁴

18 11. Student was also evaluated in February 2006 by Speech Language
19 Pathologist, who testified in support of her written report that concluded that Student no
20 longer needed speech therapy.³⁵ Speech Language Pathologist noted some topic
21 perseveration difficulties, but also noted that Student was "easily redirected."³⁶

22 12. Based on the pre-Arizona records and the evaluations described above,
23 especially the December 2005 evaluation, the MET met in February 2006 and determined
24 that Student was not eligible for special education.³⁷ Respondent School District
25

26 ²⁹ *Id.*

27 ³⁰ *Id.* at 7-8.

28 ³¹ *Id.* at 8.

29 ³² *Id.* at 11-12.

30 ³³ *Id.* at 12-13.

³⁴ Respondent's Exhibits 23 and 24.

³⁵ Respondent's Exhibit 26.

³⁶ *Id.* at 5.

³⁷ Respondent's Exhibits 15 and 16.

1 informed Parent of it's intention to make that determination and Parent requested that
2 an independent evaluation be performed.³⁸ The MET agreed to wait to make a final
3 decision until an independent evaluation was completed. Respondent School District
4 continued to implement the interim IEP through the end of the school year in May
5 2006.³⁹

6 13. In June 2006, Parent obtained a "Psychological Evaluation" from Janet
7 Chao, Ed.D. at Melmed Center in Phoenix.⁴⁰ Dr. Chao reviewed all the records noted
8 above, including the December 2005 evaluation by Dr. Viotti.⁴¹ Dr. Chao performed
9 further clinical testing of Student, focused on autism and Asperger's Syndrome.⁴²
10 Based on the test information, she found that Student was at "the autism cutoff
11 score,"⁴³ which this tribunal takes to mean a borderline score for autism.⁴⁴ Based on
12 the information gathered, some of which relied heavily on Parent's observations, Dr.
13 Chao concluded that "[Student]'s current and past behavioral presentations are
14 consistent with the DSM-IV diagnosis of Autistic Disorder."⁴⁵ She then noted the
15 impairments that met DSM-IV criteria⁴⁶ and made recommendations to the family, the
16 chief of which was to seek eligibility for community services with the Arizona
17 Department of Economic Security, Division of Developmental Disabilities (DDD).⁴⁷
18 There is very little discussion of Student's educational needs in the report.

19 14. It is apparent from the report that Dr. Chao was not focused on educational
20 issues or needs. The report does not specifically evaluate the classroom observation
21 information discussed in the December 2005 evaluation. Indeed, in a telephone
22 conversation with Dr. Chao that Dr. Viotti was part of in August 2006, he testified that
23 Dr. Chao explained she was addressing DDD as her primary audience for the report
24 and was not writing a "school evaluation."⁴⁸ She used DSM-IV criteria, not IDEA

25 ³⁸ Respondent's Exhibit 17.

26 ³⁹ Respondent's Exhibit 14.

27 ⁴⁰ Respondent's Exhibit 35 (same as Petitioners' Exhibit 15).

28 ⁴¹ *Id.* at 3-4.

29 ⁴² *Id.* at 4.

30 ⁴³ *Id.* at 7.

⁴⁴ See Respondent's Exhibit 38.

⁴⁵ Respondent's Exhibit 35 at 12.

⁴⁶ *Id.* at 12-13.

⁴⁷ *Id.* at 13.

⁴⁸ See Respondent's Exhibit 36.

1 criteria.⁴⁹ As such, this tribunal finds that the Melmed evaluation is of limited worth for
2 the issue of IDEA eligibility.

3 15. The MET reconvened and considered the Melmed evaluation.⁵⁰ In August
4 2006, it reaffirmed its determination that Student is not eligible for special education.

5 16. Student did not attend school in Respondent School District for a time, then
6 re-enrolled in April 2007. Parent challenged the MET determination by filing a due
7 process hearing request.

8 17. Many of Respondent School District's witnesses at the hearing confirmed
9 the observations noted in the December 2005 comprehensive psycho-educational
10 evaluation. Speech Language Pathologist, First Grade Public School Teacher, Former
11 Second Grade Public School Teacher, Current Second Grade Public School Teacher,
12 School Social Worker, and Elementary School Principal all testified as to the classroom
13 observations reflected in the December 2005 evaluation. Student's current teacher's
14 testimony revealed that [REDACTED] is presently behaving about the same as described in the
15 evaluation.

16 18. Parent called a number of observational witnesses—Developmental
17 Disabilities Worker, First Grade Private School Teacher, Friend, and Grandfather.
18 These witnesses testified about their observations of Student's behavior outside the
19 school. While this testimony is helpful for acquiring a "picture" of Student, it is of limited
20 value to the main issue because the witnesses lack special education knowledge and
21 experience.

22 19. Dr. Chao did not testify at the hearing, nor were her qualifications put into the
23 record.

24 ...

26 ...

28
29 ⁴⁹ DDD eligibility includes "autism," A.R.S. § 36-551(18), but as defined without relating to educational
30 needs. A.R.S. § 36-551(7). Therefore, eligibility for DDD has only slight bearing on eligibility for special
education.

⁵⁰ Respondent's Exhibit 38.

CONCLUSIONS OF LAW

This case raises issues concerning Student's eligibility and the evaluation process. The applicable law in these areas is as follows.

APPLICABLE LAW

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a free appropriate public education that meets their individual needs.⁵¹ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.⁵² To do this, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment and placement of students who need special education, and seeks to ensure that they receive a free appropriate public education. A free appropriate public education (FAPE) consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."⁵³

Eligibility and Evaluation

2. To provide the instruction and services required by the law, school districts must inform themselves about a student's disability and needs. This is accomplished by conducting "a full and individual initial evaluation" and subsequent re-evaluations to determine the child's eligibility and educational needs.⁵⁴ This consists of reviewing existing data and identifying any additional data that is needed.⁵⁵ When further assessment or testing is needed, the school district is responsible for procuring it.⁵⁶

3. To be eligible for a free appropriate public education, a student must be a "child with a disability."⁵⁷ This means that the student has a disability falling within one of ten enumerated disability categories (or multiple disabilities), including mental retardation, hearing and visual impairments, serious emotional disturbance, autism, or

⁵¹ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

⁵² *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

⁵³ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

⁵⁴ 20 U.S.C. § 1414(a)(1) and (a)(2).

⁵⁵ 20 U.S.C. § 1414(c)(1).

⁵⁶ 20 U.S.C. § 1414(c)(2).

1 other health impairments, *and* because of the disability (or disabilities) needs special
2 education and related services.⁵⁸ Specifically, an eligible student is "a child evaluated
3 in accordance with [IDEA regulations] as having [an enumerated disability], and who, by
4 reason thereof, needs special education and related services."⁵⁹

5 4. Autism is one of the enumerated disabilities. It is defined as:

6 [A] developmental disability significantly affecting verbal and
7 nonverbal communication and social interaction, generally
8 evident before age three, *that adversely affects a child's*
9 *educational performance.* Other characteristics often
10 associated with autism are engagement in repetitive
11 activities and stereotyped movements, resistance to
12 environmental change or change in daily routines, and
13 unusual responses to sensory experiences.⁶⁰

14 This definition requires that the disability adversely affect educational performance.
15 This echoes the second prong of the "child with a disability" definition, which also
16 stipulates that the disability must affect a student's education.

17 5. Thus, eligibility for special education requires both an enumerated disability
18 and the need for special education. "Special education" is "specially designed
19 instruction . . . to meet the unique needs of a child with a disability. . . ."⁶¹ "Specially
20 designed instruction" is instruction that is adapted to meet the unique needs of the child
21 by changing the content, methodology, or delivery of the instruction.⁶² So, only children
22 who have an enumerated disability *and*, because of the disability, require specially
23 designed instruction are eligible for special education and services.

24 6. In order to determine whether a child has a disability and the nature and
25 extent of any special education he may need, an evaluation process is mandated.⁶³
26 For a student who transfers within the same academic year from a school district in one
27 state to a school district in another state, and who had an IEP in the former school

28 ⁵⁷ 20 U.S.C. § 1412(a)(1)(A).

29 ⁵⁸ 20 U.S.C. § 1401(3).

30 ⁵⁹ 34 C.F.R. § 300.8(a)(1); see A.R.S. § 15-761(2).

⁶⁰ 34 C.F.R. § 300.8(c)(1)(i)(emphasis added); see A.R.S. § 15-761(1).

⁶¹ 34 C.F.R. § 300.39(a); see A.R.S. § 15-761(31).

⁶² 34 C.F.R. § 300.39(b)(3); see A.R.S. § 15-761(33).

⁶³ 20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.15; A.R.S. § 15-766.

1 district, the new school district must treat the child as eligible for special education until
2 it can conduct an initial evaluation of the student.⁶⁴

3 7. In conducting the evaluation, the school district must use a variety of means
4 for gathering a variety of information about the student, including information from the
5 parent.⁶⁵ The goal is to gather functional, developmental, and academic information
6 about the child so that the evaluation is comprehensive as to the student's educational
7 needs.⁶⁶ This information should come from teachers, parents, medical professionals,
8 and other specialists who have assessed, evaluated, tested, and observed the student in
9 a variety of settings but especially in the classroom.⁶⁷ Of primary importance are
10 comprehensive educational evaluations performed by specialists (usually educational
11 psychologists).⁶⁸

12 8. The determination of whether a child is eligible and what his needs are is
13 made by a multi-person team, which in Arizona is called the "multidisciplinary evaluation
14 team" (MET).⁶⁹ As the name suggests, this team is made up of those with knowledge
15 of the student and expertise in the various fields that are relevant to the student's
16 disability and education. The MET includes the parent.⁷⁰ The MET gathers all the
17 information described above and carefully considers it.⁷¹ If it determines that the child
18 is eligible, an IEP must be developed.⁷² If not, the parent is officially notified in writing⁷³
19 and may request a due process hearing to challenge the team's conclusion.⁷⁴

20 DECISION

21 9. A parent who files for a due process hearing alleging non-compliance with the
22 IDEA must bear the burden of proving such claims.⁷⁵ The standard of proof is
23 "preponderance of the evidence," meaning evidence showing that a particular fact is

24 ⁶⁴ 20 U.S.C. § 1414(d)(2)(C)(i)(II).

25 ⁶⁵ 34 C.F.R. § 300.304(b); 34 C.F.R. § 300.306(c).

26 ⁶⁶ 34 C.F.R. § 300.304(c).

27 ⁶⁷ 34 C.F.R. § 300.305(a); 34 C.F.R. § 300.306(c)(i).

28 ⁶⁸ See 34 C.F.R. § 300.304(c). Note that educational evaluations are so important that the parent is given
29 a right to an independent evaluation at no cost to parent. 34 C.F.R. § 300.502.

30 ⁶⁹ A.R.S. § 15-761(15).

⁷⁰ *Id.*; 34 C.F.R. § 300.306(a)(1).

⁷¹ 34 C.F.R. § 300.306(c).

⁷² *Id.*

⁷³ 34 C.F.R. § 300.503(a).

⁷⁴ 34 C.F.R. § 300.507(a).

⁷⁵ *Schaffer v. Weast*, 546 U.S. ___, 126 S. Ct. 528 (2005).

1 "more probable than not."⁷⁶ Therefore, Petitioners bear the burden of proving by a
2 preponderance of evidence that Student is eligible for special education, and if so, his
3 special education needs.⁷⁷ Petitioners have not met the burden with regard to Student's
4 eligibility. Therefore, the other two issues, regarding Student's educational needs, are not
5 addressed.

6 10. The greater weight of the evidence in this case supports the conclusion of
7 the December 2005 evaluation and the MET: Student is not eligible for special
8 education because [REDACTED] disability does not adversely affect [REDACTED] education.

9 11. Although it is borderline, the evidence indicates that Student has autism as
10 that condition is understood within the medical community. Clearly, however, [REDACTED] is
11 high-functioning. And for purposes of special education eligibility, there is a
12 requirement that the disability adversely affect educational performance. The evidence
13 simply does not show that adverse affect here.

14 12. The December 2005 evaluation is found to be more probative of Student's
15 eligibility than the Melmed evaluation. Dr. Viotti conducted a comprehensive evaluation
16 of Student, focusing on [REDACTED] educational needs based on the suspected disability.
17 Although there was some evidence from Parent that Student's disability greatly affected
18 [REDACTED] communication skills, social skills, and behavior, an overwhelming amount of data
19 showed that [REDACTED] disability did not adversely affect [REDACTED] educational performance.
20 Furthermore, Dr. Viotti testified clearly, credibly, and knowledgeably in support of his
21 evaluation.⁷⁸ Because it focuses on educational needs and Student's educational
22 performance, the December 2005 evaluation is given more weight than the Melmed
23 report.

24
25
26
27
28 ⁷⁶ *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in*
29 *Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

30 ⁷⁷ It makes no legal difference that Student was receiving IDEA services in the former state. [REDACTED] had never
been assessed for eligibility in Arizona; this was an initial evaluation. For a reevaluation that finds
ineligibility, the burden might be shifted.

⁷⁸ Dr. Chao's background and qualifications are not in the record.

1
2 **ORDER**

3 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
4 the relief requested in the due process complaint is **denied**. Student is not eligible for
5 special education.

6 Done this 8th day of June 2007.

7
8 OFFICE OF ADMINISTRATIVE HEARINGS

9 
10 _____
11 Eric A. Bryant
12 Administrative Law Judge

13 **RIGHT TO SEEK JUDICIAL REVIEW**

14 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(F)(3), this
15 Decision and Order is the final decision at the administrative level.
16 Furthermore, any party aggrieved by the findings and decisions made
17 herein has the right to bring a civil action, with respect to the complaint
18 presented, in any State court of competent jurisdiction or in a district court
19 of the United States. Any action for judicial review must be filed within 90
20 days of the date of the Decision or, if the State has an explicit time
21 limitation for bringing this type of action, in such time as the State law
22 allows.
23
24
25
26
27
28
29
30

1 Copy **electronically mailed** and
2 mailed by certified mail (No. 7001 0360 0002 8217 1341
3 this 11 day of June 2007, to:

4 Kim Adams
5 P.O. Box 533
6 Cottonwood, AZ 86326
7 **kimieadams@yahoo.com**

8 Copy mailed by certified mail (No. 7001 0360 0002 8217 1358
9 this 11 day of June 2007, to:

10 Kellie A. Dolan, Attorney
11 MANGUM, WALL, STOOPS & WARDEN, P.L.L.C.
12 100 North Elden St./P.O. Box 10
13 Flagstaff, AZ 86002-0010
14 Attorneys for Respondent School District

15 Copies mailed by regular/interdepartmental mail
16 this 11 day of June 2007, to:

17 Kim Adams
18 P.O. Box 533
19 Cottonwood, AZ 86326

20 Lynn Busenbark, Exceptional Student Services
21 Arizona Department of Education
22 ATTN: Greg Yardley
23 1535 West Jefferson
24 Phoenix, AZ 85007

25 By Chris Fisher